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The Convergence of Public and Corporate Power in Peru: Yanacocha Mine, Campesino Dispossession, Privatized Coercion

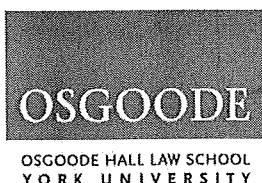
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THE CONVERGENCE OF PUBLIC AND CORPORATE POWER IN PERU: YANACOA MINE, CAMPESINO DISPOSSESSION, PRIVATIZED COERCION

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The Convergence of Public and Corporate Power in Peru: Yanacocha Mine, Campesino Dispossession, Privatized Coercion

Abstract: This paper focuses on the convergence of the corporate power of Yanacocha Mine with the Peruvian State's public power. The convergence is studied in relation to two interrelated and fundamental sites of power: land rights and the regulation of the use of force. Parts One and Two present two international human rights litigation initiatives: the *Negritos Case* and the *Grufides Case*. The legal history behind the *Negritos Case* illustrates the complex relationship between Peru's colonial history, the 1960s Agrarian Reform, the neo-liberal shift in the 1990s, and Yanacocha's current status as one of the most profitable goldmines in the world. The serious land rights violations alleged in the *Negritos Case* provide the social context for the *Grufides Case*, namely, the emergence of widespread social protest and the escalating use of private security companies by multinational mining companies. The *Grufides Case* depicts the dynamics of corporate impunity, and the legal regime that facilitates it, pointing to a shift in the legitimate exercise of coercive force from the State to the corporate sector. In Part III, the author analyzes four legal processes that flow from the private public convergence: (1) the privatization of land; (2) the production of consent; (3) the privatization of coercive force; and (4) the absence of effective legal remedies. The human rights implications of these processes in international and national law are highlighted. In conclusion, the author considers the significance of the case study for those who seek to engage international law to address the human rights issues at the centre of the private public convergence.

Keywords: Law, convergence of public and corporate power, Peru, Yanacocha Mine, privatized coercion

JEL Classification: K30

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THE CONVERGENCE OF PUBLIC AND CORPORATE POWER IN PERU: YANACOCOA MINE, CAMPESINO DISPOSSESSION, PRIVATIZED COERCION

Charis Kamphuis¹

I. INTRODUCTION

Yanacocha Mine is the largest gold mine in Latin America and one of the most profitable in the world. It is located between 3500 to 4000 meters above sea level in the Cajamarca region of the Peruvian Andes, approximately 35 kilometers north of the city of Cajamarca or about a sixteen-hour bus ride north of Lima. Three shareholders own and control Yanacocha: the Peruvian Compañía de Minas Buenaventura and the International Finance Corporation hold a minority interest; the Newmont Mining Corporation, one of the largest gold mining company in the world, is the majority shareholder. Since Yanacocha began operations in the early nineties, significant social, political and legal conflict has ensued. The primary locus of this conflict is the land occupied by Campesino Communities.

The focus of this paper is on the convergence of Yanacocha's corporate power and the Peruvian State's public power in relation to two interrelated and fundamental sites of power: land rights and the regulation of the use of force. This convergence occurs in a particular social and cultural context: the land in question is Campesino land, and the use of force at issue is exercised primarily with regard to Campesino Communities and their advocates. In this respect, the merger of public and private power articulates with broader patterns of institutionalized ethnic, social and cultural discrimination faced by Campesino Communities, together with other Indigenous groups in Peru.²

This paper presents two international human rights litigation initiatives that focus on this reconfiguration of public and private power. The story of each case is told through official documents that form the evidentiary basis of each case. These documents have been collected,

¹ This paper results from the collaborative legal work carried out by an organically constituted transnational team of volunteer lawyers and law students, working under the direction of Professor Shin Imai of Osgoode Hall Law School since February 2008. However, the work of two people in particular has been essential. The *Negritos* and *Grufides* Cases came to fruition only as a result of the consistent wisdom, support and guidance of Professor Imai. That said, neither case would exist without the dedicated work and courage of Peruvian lawyer Jesica Karina Chuquilín Figueroa. This paper was written as part of a United Nations University (UNU) funded research project that will be published in a forthcoming volume by the UNU Press.

² OAS, Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Peru*, OR OEA/Ser.L/V/II.106, Doc. 59 rev (2000) at para. 32. Andean high land indigenous people remain among the poorest, most marginalized members of society: see Gillette Hall & Harry Anthony Patrinos, *Indigenous Peoples, Poverty and Human Development in Latin America: 1994-2004* (Washington: World Bank, 2004) [Hall & Patrinos].

reviewed and systematized by a transnational team of community members, volunteers, lawyers, and law professors in Cajamarca, Lima and various Canadian cities. The factual evidence of each case is further contextualized by the most pertinent social science literature.

Part One discusses the *Negritos Case*, which will eventually go to the Peruvian Constitutional Court. I begin this part by providing an overview of the major political and legal shifts in Peruvian Campesino land law and foreign investment policy since 1969. The legal history of the Campesino Community San Andres de Negritos illustrates the complex relationship between Peru's Agrarian Reform and Yanacocha's operations and reveals that the land now occupied by Yanacocha is the ancestral land of the Negritos Community. The allegations in the *Negritos Case* relate to the transfer of land interests from the Negritos Community to Yanacocha in violation of Peruvian constitutional law and international human rights treaties.

Part Two presents a second litigation initiative, the *Grufides Case* before the Inter-American Human Rights Commission. I begin this section with a brief description of the dynamics that inform the emergence of widespread social protest in response to mining expansion and the corresponding rise of private security companies servicing multinational mining companies operating in Peru. In Cajamarca, when the grassroots NGO Grufides organized to support Campesino protest and activism, Yanacocha responded in part by employing private security companies. The *Grufides Case* relates to the refusal of the Peruvian State to prosecute the human rights violations arising from the alleged surveillance and persecution of Grufides personnel and Campesino leaders by Yanacocha's private security companies. This form of alleged corporate impunity, and the legal regime that facilitates it, point to a shift in the legitimate exercise of coercive force from the State to the corporate sector.

Finally, in Part Three I identify four legal processes that flow from the private public convergence in the *Negritos Case* and the *Grufides Case*: (1) the privatization of land; (2) the production of consent; (3) the privatization of coercive force; and (4) the absence of effective legal remedies. The conflation of the roles and responsibilities of the State and Yanacocha in the context of each of these legal processes is analyzed. The human rights implications of these processes in international and national law are highlighted throughout the discussion.

In conclusion, I consider the significance of this case study for human rights scholars, lawyers and activists who seek to engage international law as a tool for addressing the human rights issues raised by the convergence of private and public power.

II. THE EVOLUTION AND DEVOLUTION OF THE NEGRITOS CAMPESINO COMMUNITY RIGHTS

A. ORIGIN OF NEGRITOS COMMUNITY LAND RIGHTS IN PERUVIAN LAW

The term “indigenous” first appeared in Peruvian legal discourse in 1824 and 1825 when Simon Bolivar declared that “indigenous Peruvians” were the rightful owners of the property in their possession and, further, that their labour must flow from freely made contracts.³ A century later, “indigenous communities” were recognized in Peru’s 1920 and 1933 Constitutions as having special indigenous communal land rights that in turn gave rise to State responsibilities to protect these rights. This continuity in terminology was broken in 1969 when Peru’s *Agrarian Reform Law*⁴ declared that, from that moment forward, “Indigenous Communities” would be referred to as “Campesino Communities” whose members would be denominated “comuneros”.⁵ In addition to this change in discourse, Agrarian Reform purported to replace the *latifundio* or *hacienda* land holding system with a fair property system that would guarantee social justice in the rural areas.⁶ The objective of Agrarian Reform was to create a just system of property and tenancy in the pursuit of the economic and social development of the nation.⁷

Between 1970 and 1987 the State created a legal regime to restructure the social, political and economic organization of Peru’s Campesino Communities.⁸ This legislative framework, which largely remains in place, defines Campesino Communities as organizations composed of families that inhabit and control specific territories. Further, these families are described as having ancestral, social, economic and cultural ties that are expressed through communal property title, communal work, mutual support, and democratic government.⁹ Campesino Communities are deemed to be fundamentally democratic institutions, autonomous in their organization, communal work and use of land.¹⁰ The legislation further provides that decisions are made by way of General Assemblies and an elected Communal Directive.

³ Simon Bolivar, President of the Republic of Colombia and liberator of Peru, *Decree* (8 April 1824), art. 3.; Simon Bolivar, President of the Republic of Colombia and liberator of Peru, *Decree* (4 July 1825), art. 1.

⁴ Law No. 17716, *Agrarian Reform Law* (1969).

⁵ *Ibid.*, art. 115.

⁶ *Ibid.*, art. 1. The terms “*latifundio*” and “*hacienda*” are used in the Spanish-speaking parts of the Americas to refer to a large agricultural estate owned by a wealthy landowner of Spanish origins and worked by a large number of precariously employed families of indigenous origins. This Spanish model of property ownership was exported to the Americas in the colonial era.

⁷ *Political Constitution of Peru*, 1979, art. 159.

⁸ Supreme Decree No. 37-70-AG, *Campesino Communities Special Statute* (1970); Law No. 24656, *Campesino Communities General Law* (1987); Law No. 24657, *The Demarcation and Titling of the Campesino Communities’ Territory is Declared a National Need and a Social Interest* (1987).

⁹ *Campesino Communities General Law*, *ibid.*, art. 2.

¹⁰ *Ibid.*, art. 1.

Woven throughout the legislation cited above is the centrality of the Campesino Community's territory to its cultural and political structure. This territory is defined to include, *inter alia*: the Community's original land, the land which the Community possesses, the land set out in its property title, and land allotted during Agrarian Reform.¹¹ Communal land is given special legal protection in that it can only be alienated with the agreement of at least two-thirds of the Community and the passage of a law approving the alienation in the interests of the Community.¹² Within the legal framework of communal title, individual families can obtain "certificates of possession", issued by the Community's governing bodies. Finally, the expropriation of communal territory is permitted, but only for the purpose of public need and utility and after the payment of a fair price.¹³

Agrarian Reform in Peru was not conceived of in an indigenous rights framework. Most notably, it did not incorporate the premise that indigenous people hold inherent property rights.¹⁴ Rather, it was based on the assumption that the State has underlying title to the land and that all title emanates from the State.¹⁵ The reform's ultimate purpose was to lay the foundation for a more capitalist, efficient system of agricultural production.¹⁶ In theory, Agrarian Reform was to occur according to the following steps. First, State officials were to identify the land belonging to *hacienda* owners as appropriate for reform. Then, the State was to impound the land and expropriate property title from the *hacienda* owners. At this point, the ownership of the land reverted to the State. Finally, the State was to recognize the Campesino Community's legal personhood, demarcate its territory, and grant it communal title.

The failure of Peru's Agrarian Reform project is made out most poignantly by the fact that over two decades after its inception, the vast majority of Campesino Communities had yet to receive registered title.¹⁷ The story of the Campesino Community San Andres de Negritos models some of the inefficiencies and irregularities endemic in Peru's Agrarian Reform. In 1971 and again in 1974, the Negritos *comuneros* were deemed eligible for Agrarian Reform in relation to 14,375 hectares of land, formerly owned by a large *hacienda* owner. However, in 1975, State officials purported to sell title to Negritos land to false representatives of a neighbouring Campesino

¹¹ *Ibid.*, art. 2.

¹² *Ibid.*, art. 7. This protection was also enshrined in article 163 of the *Political Constitution of Peru*, 1979 until 1993 when then president Alberto Fujimori eliminated these protections in his new and controversial Constitution.

¹³ *Ibid.*

¹⁴ *Case of the Community of Mayagna (Sumo) Awas Tingni (Nicaragua)* (2001) Inter-Am. Ct. H.R. (Ser. C) No. 79 [Awas Tingni].

¹⁵ Fergus MacKay, "Indigenous land rights: legal issues" in Marcus Colchester, ed., *A Survey of Indigenous Land Tenure* (FAO, 2001) at 18.

¹⁶ Tom Griffiths, "Indigenous Peoples, Land Tenure, and Land Policy in Latin America" in P. Groppo, ed., *Land Reform: Land Settlement and Cooperatives* (FAO, 2004).

¹⁷ According to the 1994 Census, of the 5680 recognized Campesino Communities in Peru, it is estimated that only 20% have had their land properly demarcated and it is unknown how many have obtained registered title: Laureano del Castillo, "Propiedad Rural, Titulación de Tierras y Propiedad Comunal" (1997) 26 *Debate Agrario* 59 [del Castillo, "Propiedad Rural"].

Community. Upon becoming aware of this fraud, in 1986 the Negritos Community actively organized to obtain State recognition and land title. Finally, in 1990, the Campesino Community San Andres de Negritos, consisting of 140 families, was granted legal personhood and its communal right to 14,375 hectares of land was officially recognized. In 1991 the Negritos Community's communal title was registered in the Public Registrar.

With these documents and recognition, the Negritos *comuneros* had the formal basis upon which to avail themselves of the rights, protections and benefits available to Campesino Communities under the corresponding legislative regimes, constitutional provisions and international human rights law. Finally, more than two decades after the 1960s social justice-oriented spirit of Agrarian Reform had swept Peru, the Negritos Community was able to formalize its historic rights into tangible legal documents.

B. THE ELIMINATION OF NEGRITOS COMMUNAL RIGHTS

1. THE DOMESTIC POLITICAL AND LEGAL CONTEXT: A NEO-LIBERAL SHIFT IN PUBLIC POLICY

As the Negritos Community legally consolidated its land rights, Peru was plunged into a process of radical legal, political and economic change. In 1990, Alberto Fujimori's was elected president of Peru. Under the auspices of the World Bank and the International Monetary Fund, Fujimori immediately instituted "shock therapy", a program of wide-ranging neo-liberal economic and political reforms,¹⁸ which were actually further to the right of the election platform proposed by his unsuccessful rival to the right. Fujimori passed a dizzying array of laws to radically reduce restrictions on international trade, investment, imports and capital flow.¹⁹ Government funded health, education and other social services were significantly cut back or eliminated. In the wake of this restructuring, in 2001 the International Monetary Fund assessed Peru to be one of the most open and liberal economies in the world.²⁰

Fujimori's economic reforms were accompanied by significant changes to Peruvian Campesino land law. In 1991 Fujimori repealed the *Agrarian Reform Law*, replacing it with the *Law for the Promotion of Investment in the Agrarian Sector*.²¹ This was followed in 1992, by the introduction of an agrarian land-titling program that only contemplated individual land titling,

¹⁸ Jeffery Bury, "Neoliberalismo, minería y cambios rurales en Cajamarca" in Anthony Bebbington, ed., *Minería, Movimientos Sociales y Respuestas Campesinos* (Lima, CEPES & IEP: 2007) 49 at 50-6 [Bury, "Cambios rurales"].

¹⁹ See for example: Legislative Decree No. 662, *Granting a legally stable regime to foreign investors through the recognition of certain guarantees* (1991); Legislative Decree No. 757, *Legal Framework for the Growth of Private Investment* (1991); Legislative Decree No. 674, *Law for the Promotion of Private Investment in State Enterprises* (1991); Legislative Decree No. 708, *Law for the Promotion of Investments in the Mining Sector* (1991).

²⁰ Bury, "Cambios rurales" *supra* note 18 at 54.

²¹ Legislative Decree No. 653, *Law for the Promotion of Investment in the Agrarian Sector* (1991).

intentionally excluding Campesino Communities from its purview.²² In 1993, Fujimori narrowly passed a new and highly controversial Constitution that significantly reduced the constitutional protection that Campesino communal land had enjoyed for the previous 73 years.²³ This opened the legal door for a controversial new law, dubbed the “*Land Law*”.²⁴ This 1995 legislation reduced the content of Campesino rights and outlined a framework to facilitate the disposition of Campesino land to private investors by way of an extraordinarily expedited process of direct negotiation between mining companies and Campesino Communities within which the Community had no substantive right to refuse the investor’s proposal.²⁵ The *Land Law* further guaranteed natural and legal persons, either national or foreign, equal access to agrarian property.²⁶ This legal trajectory has been continued, if not accelerated, by subsequent governments.²⁷

The policy shifts described above coincided with the beginning of gold mining operations on Negritos land. In 1992 the construction of Yanacocha Mine began, spearheaded by the American company Newmont Mining Corporation, the largest gold mining company in the world at that time. The Peruvian Minas Buenaventura Company and the International Finance Corporation joined Newmont in this venture as minority shareholders. Yanacocha represented the first large scale foreign direct investment in Peru since 1976.²⁸ The Fujimori government contracted with Yanacocha to guarantee the company a low rate of income tax in a foreign investment contract that, among other benefits, included tax-stability provisions.²⁹ Even more significantly, the Fujimori government granted Yanacocha and other mining companies a

²² Roger Plant & Soren Hvalkof, *Land titling and indigenous peoples in Latin America* (Washington, DC: Inter-American Development Bank, 2001) at 3-4, 21, 58 [Plant & Hvalkof]; Marcus Colchester, *et. al.*, “Indigenous Land Tenure: Challenges and Possibilities” in P. Groppo, ed., *Land Reform: Land Settlement and Cooperatives* (FAO: 2004) at 13; Laureano del Castillo Pinto, “La titulación de tierras de propiedad de comunidades Campesinos en el Perú” in P. Groppo, ed., *Land Reform: Land Settlement and Cooperatives* (FAO: 2004).

²³ Whereas the 1979 Political Constitution of Peru recognized Campesino Communities as “autonomous in their organization, communal work, and the use of their land” (art. 161), the 1993 Political Constitution of Peru added “autonomous in...the use and *free disposal* of their land” (art. 89). The addition of these words is said to undo all indigenous historical territorial rights because it exposes their property to an aggressive capitalist market: Cletus Gregor Barié, *Pueblos Indígenas y derechos constitucionales en América Latina: un panorama*, 2d ed. (La Paz, Bolivia: Génesis, 2003) at 495 [Barié]. Further, the requirement in the 1979 Constitution that Campesino land may only be subject to alienation and mortgage with a favourable vote of two-thirds of the community (art. 163) was dropped in the 1993 Constitution.

²⁴ Law No. 26505, *Law for the Promotion of Private Investment in the Development of Economic Activities on the National Territory and on Campesino and Native Community Land* (1995) [*Land Law*].

²⁵ del Castillo, “Propiedad Rural” *supra* note 17; Laureano del Castillo, “La Ley de Tierras y los Límites al Derecho de Propiedad” (1995) 23 *Debate Agrario* 13.

²⁶ *Land Law*, *supra* note 24 at art. 41.

²⁷ For an excellent overview of the most recent conflicts over market-oriented land laws in Peru, see: Pedro Castillo Castañeda, *El Derecho a la Tierra y los Acuerdos Internacionales: el Caso de Perú* (Lima, CEPES & International Land Coalition: 2009).

²⁸ Jeffrey Bury, “Mining mountains, neoliberalism, land tenure, livelihoods, and the Peruvian mining industry in Cajamarca” (2005) 37 *Environment and Planning* 221 at 228 [Bury, “Mining mountains”].

²⁹ Christian Aid, *Undermining the Poor: Mineral Taxation Reforms in Latin America* (September 2009) at 9, 16.

complete exemption from royalty payments.³⁰ In this context, Yanacocha became the largest gold mine in Latin America with some of the lowest production costs in the world.³¹ It is Newmont's most profitable goldmine and the IFC's largest and most profitable investment in the mining sector.³²

Beyond these policy changes, the entry of substantial private investment into Peru was also facilitated by the political corruption of the Fujimori government. Some public evidence on this point has emerged with regard to Yanacocha. In 1998 officials representing both the Central Intelligence Agency (CIA) and Newmont influenced the upper echelons of the Peruvian political and legal system in order to secure Newmont's legal rights to Yanacocha over those of a rival French company.³³ These dealings were documented in secret video recordings that became public in 2000, forming part of a political scandal that caused Fujimori to flee the country. In 2009, in a number of different proceedings, the Peruvian Supreme Court of Justice would later find Fujimori guilty of a long list of crimes, including murder, crimes against humanity, corruption, bribery and illegal interception of telephone communications.³⁴

The preceding paragraphs describe the legal and political context within which Yanacocha obtained the concession rights to the minerals located under the communal land of the Campesino Community San Andres de Negritos. In Peruvian constitutional law, mineral resources are property of the State, including those located under Campesino communal land.³⁵ The State interprets this to mean that it may grant concession rights to minerals without the consent or participation of the surface property owner. However, upon granting concessions rights, the State leaves it to the concession owners to obtain permission from the surface owner to enter and use the land in question. Thus, Yanacocha faced a final legal hurdle: it had to obtain the right to use the surface area of Negritos land. For this reason, the question of access to land and land rights are at the core of the *Negritos Case*.

In the four years following Yanacocha's arrival, the Negritos Community was systematically stripped of its land rights and finally, its very legal existence. The *Negritos Case* illuminates, on

³⁰ *Ibid.* Although the rules regarding tax subsidies and royalty exemptions changed following the fall of the Fujimori government in 2000, Yanacocha has refused to abide by the new laws, claiming that it is exempted by virtue of its investment contract.

³¹ Bury, "Cambios rurales" *supra* note 18 at 67.

³² World Resources Institute in Lisa J. Laplante & Suzanne A. Spears, "Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector" (2008) 11 *Yale Human Rights & Development Law Journal* 69 at 104 [Laplante & Spears]; Anthony Bebbington, *et. al.*, "Contention and Ambiguity: Mining and the Possibilities of Development" (2008) 39 *Development and Change* 965 at 974 [Bebbington, *et. al.*, "Contention and Ambiguity"].

³³ Jane Perlez & Lowell Bergman, "Tangled Strands in Fight Over Peru Gold Mine" (Series: *The Cost of Gold: Treasure of Yanacocha*) *New York Times* (25 October 2005).

³⁴ Exp. No. 10-2001 / Acumulado No. 45-2003 A.V., Supreme Court of Justice of the Republic, Special Criminal Appeals Section (7 April 2009); Exp. No. AV-33-2003, Supreme Court of Justice of the Republic, Special Criminal Appeals Section (30 September 2009).

³⁵ *Political Constitution of Peru* (1993), art. 66: "The renewable and non-renewable natural resources are the heritage of the Nation. The State is sovereign in their exploitation." Also see: *Mining Law*, *infra* note 41, Preliminary Title II: "All of the mineral resources belong to the State, whose property is inalienable and cannot be subject to prescription."

the basis of formal, publicly available documentation, the role of the State and Yanacocha in the privatization of Negritos communal land in favour of Yanacocha, culminating in the attempted elimination of the Negritos Community's rights. This was done under the auspices of four legal processes: (1) the imposition of individual title; (2) the purported expropriation of land and establishment of a mining easement; (3) the purported annulment of the legal personhood of the Community; and (4) the third party invasion of communal lands. Each of these processes will be presented in turn.

2. THE ATTEMPTED ELIMINATION OF RIGHTS THROUGH FOUR LEGAL PROCESSES

(1) The Imposition of Individual Title

In December of 1991, the Peruvian State passed a Resolution (the "1991 Resolution") to individually title approximately half of Negritos communal lands in favour of 92 Negritos *comuneros* who signed the Resolution. The other half of Negritos communal land was designated a "Reserve Area", meaning that it was converted into property of the State, to be individually titled at the State's discretion on some later date. In other words, the 1991 Resolution purported to extinguish the Negritos Community's communal land interest, presumably with the consent of a sizable portion of the Community. This radical and abrupt attempt to eliminate Negritos communal land interest occurred a little more than a year after the Negritos Community had successfully obtained State recognition and communal title.

Why would the Negritos *comuneros* have consented to the elimination of their hard won communal land rights with no compensation? The *Negritos Case* contends that there was no such consent and that the Negritos *comuneros* never understood the 1991 Resolution's legal effect. There is no evidence that Negritos Community received an explanation of the legal significance of individual title and its implications for the *comuneros'* collective and individual rights. Rather, the documentary evidence indicates that State officials made serious misrepresentations to the Community in order to procure the *comuneros'* acceptance of the 1991 Resolution.

A wealth of contextual documentary evidence further supports the strong inference that the Negritos *comuneros* did not understand the legal meaning or implications of individual versus communal title under Peruvian law. The move to individual title contradicted the Community's entire written history of communal decision-making, particularly its own written laws and governing documents. Moreover, in the wake of the 1991 Resolution, the Negritos Community continued to make communal decisions with regard to its entire territory, apparently unaware that its jurisdictional authority had been eliminated by the Resolution. Finally, the written record of communal decision-making reveals that, both before and after the 1991 Resolution, the Negritos *comuneros* used the terms "property title" and "property certificate"

interchangeably, regardless of the fact that these distinct legal terms respectively refer to individual and communal property arrangements.

The Negritos Community's evident confusion as to the significance of individual title is attributable to the inaccessibility, from the perspective of the Negritos *comuneros*, of the Peruvian post-Agrarian Reform legal regime. When the 1991 Resolution was passed, close to half of the Negritos *comuneros* were illiterate, less than one-third had completed secondary education, while at least four-fifths relied solely on a subsistence livelihood.³⁶ Yet this socio-economic statistical information only partially explains the vulnerability of the Negritos *comuneros* to the imposition of an individual property regime in the face of their established communal rights.

Several anthropological studies have demonstrated that Peru's Campesino Communities have complex, mixed and multilayered conceptions of property that blend communal and familial rights into different and variable arrangements.³⁷ This highly nuanced concept of property does not articulate with the dichotomous view of individual and communal property as two mutually exclusive concepts. As indicated in the previous section, the most recent incarnation in Peruvian law of this largely Western conception of property occurred in 1969 with Agrarian Reform. Since then, the binary approach to property has been integral to subsequent domestic regimes; it is foundational to both the protectionist legislation of the 1980s as well as to the neo-liberal approaches commenced in 1990. Both approaches have required that, in order to maintain the special rights afforded to Campesino Communities, *comuneros* must accept communal title, with individual "certificates of possession", to the exclusion of individual title.

Yet Campesino Communities in Peru see their territory as consisting of different types of land, each associated with a different blend of communal and familial ownership. The particular configuration of this blended property arrangement varies from Community to Community and according to the type of agricultural production that may be dominant in a particular Community. Further, while a Community's use of its territory may be predominately family-based, communal conceptions of property may become more prominent where there is a need for collective action in defence of the territory. As one anthropologist has observed, for *comuneros*, there is no contradiction between obtaining individual title from the State, and holding a certificate of property issued by the Community. In this conception, the difference between individual title and a certificate of possession signals a difference in degree of protection rather than a difference in a genre of property. For *comuneros*, individual title signifies increased security, and therefore the more titles and certificates that a family can obtain, the better.³⁸ It has been observed that *comuneros* tend to want individual (family) title

³⁶ The National Institute for Statistical Information, *Censos Nacionales IX de Población y IV de Vivienda 1993*.

³⁷ Alejandro Diez, "Interculturalidad y Comunidades: Propiedad Colectiva y Propiedad Individual" (2003) 36 *Debate Agrario* 71 [Diez, "Interculturalidad"]; Laureano del Castillo, "Titulación de las Comunidades Campesinas: CEPES, ALLPA y la Problemática Comunal" (2003) 36 *Debate Agrario* 89 [del Castillo, "Problemática Comunal"]; Barié, *supra* note 23 at 492-3; Plant & Havlkof, *supra* note 22 at 15.

³⁸ Diez, "Interculturalidad", *ibid.* at 85.

while they also want to conserve the Community as a communal (and legally recognized) institution.³⁹

(2) The Purported Expropriation of Negritos Land and Establishment of a Mining Easement

A few months after the 1991 Resolution, Yanacocha approached the Peruvian State in May of 1992 to request the expropriation of a portion of Negritos land in order to effect the installation of a lixiviation plant. In December of 1994 Yanacocha made a similar request for an easement in order to build dynamite platforms and access roads.⁴⁰ The land pertaining to the easement and the expropriation were essential to Yanacocha's initial operations. The dynamite platforms permitted Yanacocha to set up the infrastructure needed to blast and loosen rock containing gold. The loosened rock would then be transported *via* the access roads to the lixiviation plant where a cyanide solution would be leached through the earth in order to separate the gold from other materials.

The expropriation and the easement followed somewhat similar procedures. In the expropriation process, the State assigned a monetary value to the land to be expropriated, summoned the parties to meet, and approved the expropriation by way of a Resolution. In the easement process, Yanacocha determined the amount of compensation and the State's role was limited to summoning the parties to meet. The new *Mining Law*, introduced by Fujimori in 1991, contemplated that expropriations and easements would proceed by way of a private agreement made directly between the mining company and the property owner.⁴¹ On this basis, dealings regarding the expropriation and the easement took place directly between Yanacocha and a small group of three and seven Negritos *comuneros* respectively. Purporting to represent the Negritos Community, these individuals signed the related agreements in Lima, almost 900 kilometres away from the Negritos Community. Upon completing the deal, Yanacocha transferred compensation directly to the same small group of *comuneros*.

There is no evidence that the compensation funds were ever distributed to the Negritos Community in accordance with communal laws or decision-making processes. There is no evidence that the Negritos Community received information regarding the legal meaning of the land transfers, the right to fair compensation, the estimated value of the land at issue, the benefits that Yanacocha stood to acquire, or the possible environmental impacts of the planned mining activities. Rather, the documentary evidence reveals, not only that the signatories to the expropriation and easement agreements were not legitimately elected, but that they later

³⁹ del Castillo, "Problemática Comunal", *supra* note 37 at 93, 95.

⁴⁰ In this process, Yanacocha and the State indirectly treated the "Reserve Area" created by the 1991 Resolution as though it were property of the Community, even though the legal effect of the 1991 Resolution was to "revert" the Reserve Area to the State. This contradicts the position of the State and Yanacocha taken just a few years later, and maintained to date, that the Reserve Area is property of the State.

⁴¹ Supreme Decree No. 014-92-EM, *General Mining Law* (1991) at arts. 130-1 [*Mining Law*].

became implicated in systematic acts of fraud, falsification of documents and intimidation in order to affect the transfer and sale of the Community's land to Yanacocha. The Community was to collectively rebuke several of these individuals in a series of public meetings beginning in 1996.

Thus, with the State's blessing, Yanacocha purported to privately contract with the Negritos Community to transfer the land interests associated with the expropriation and the easement. These private contracts contained shockingly beneficial terms for Yanacocha. Documents suggest that in 1993, 609.44 hectares of Negritos land was expropriated in favour of Yanacocha in return for approximately thirty thousand US dollars (\$ 30,000). In 1995, according to documents, 800.10 hectares of Negritos land was subject to the easement requested by Yanacocha in return for approximately eighteen thousand US dollars (\$ 18,000). Unknown to the Community, one month after receiving title, Yanacocha mortgaged the expropriated land for fifty million US dollars (\$ 50,000,000) to the International Finance Corporation and a German Bank. A year later in 1994, Yanacocha obtained a second mortgage over the expropriated land in the amount of thirty-five million US dollars (\$ 35,000,000) from the same two financial institutions.

There is no question that this initial acquisition of these Negritos property interests was an essential factor in the unprecedented success and profitability that Yanacocha quickly attained. Indeed, Yanacocha had acquired the concession rights to one of the most valuable gold deposits in the world with the benefit of a foreign investment contract that guaranteed a low rate of tax and zero royalties. Further, Yanacocha presumed to have acquired the corresponding surface rights to 1,209 hectares of traditional Campesino Community land for a mere US\$ 48,000, free of any additional cumbersome rights and obligations to the Community. Having secured this very lucrative legal arrangement, Yanacocha easily obtained start-up financing loans totalling US\$ 85 million.

(3) The Purported Annulment of the Negritos Community's Legal Personhood

On the heels of the expropriation and the easement, the State passed a Resolution in September of 1995 purporting to annul the legal personhood of the Campesino Community San Andres de Negritos. The 1995 Resolution also extended the individual titling of Negritos land to include another 102 Negritos *comuneros* thereby individually titling almost all of Negritos communal land. The Reserve Area (property of the State) that had been created by the 1991 Resolution was reduced to 1033.97 hectares. The intended legal result of the 1995 Resolution was to eliminate all of the political, economic and cultural rights previously held by the Negritos Community.

The *Negritos Case* alleges that the 1995 Resolution violated basic principles of Peruvian administrative civil law. The documentary evidence also substantiates that the 1995 Resolution was facilitated by fundamental legal misrepresentations to the Community on the part of State officials and Yanacocha functionaries. A legal opinion written by a State lawyer was circulated widely among Community members. This document defended the validity of the 1991

Resolution on individual titling. It also declared that the Negritos Community had never held a collective property right to its traditional land and that the Negritos land rightfully belonged to the State. Together with the previously described practices of corruption and intimidation on the part of the *comuneros* who had signed off on the expropriation and the easement, this erroneous legal opinion lead to significant conflict among Negritos *comuneros*.

Thus, four short years after the arrival of Yanacocha, the legal personhood of the Negritos Community had been allegedly annulled, the Negritos communal property interest had been presumably eliminated, and each Negritos family now held a document of individual title to a demarcated parcel of land. Yanacocha, one of the most powerful gold mines in the world, was conveniently free "to solicit" the purchase of land from individual Negritos families, who had never before owned land in a free market. The subsequent land purchases are now infamous in Peru for, at best, gross unfairness, and at worst, acts of deception, abuse of power, and intimidation.⁴² It is estimated that, at present, approximately one-third of Negritos original land interests have been transferred to Yanacocha.

In sum, the State and Yanacocha benefited from the Negritos *comuneros*' lack of legal knowledge and the inherent bias toward individual title in the Peruvian legal regime to facilitate the "transfer" of land from the Community to Yanacocha in return for minimal compensation. However, in spite of the formal loss of their legal rights, the Negritos *comuneros* have maintained their communal institutions, including regular elections of communal leadership. Together with other communities, they began to politically organize to address the mining-related issues affecting communities in the area. In 1999, the Negritos *comuneros* participated in the first incident of widespread Campesino protest against the continued expansion of Yanacocha.⁴³ In an effort to garner formal legitimacy for its collective claims against Yanacocha and the State, the Negritos Community officially registered its governing body with the Public Registrar in 2004. In 2006, 156 of 243 registered *comuneros* (heads of family) approved of a modified *Community Statute*.

The continued level of political organization of the Negritos Community is remarkable given that Yanacocha's presence has dramatically weakened the "social capital" of the rural

⁴² See *infra* section IV. A. 2. Some empirical studies have documented the tactics adopted by Yanacocha in purchasing land from local Campesinos: Shanna Langdon, "Peru's Yanacocha Gold Mine: The IFC's Midas touch?" in *Profiling Problem Projects* (Project Underground, 2003); Bury, "Cambios rurales" *supra* note 18 at 76-7; Anthony Bebbington, *et. al.*, "Mining and social movements: struggles over livelihood and rural territorial development in the Andes" (forthcoming) *World Development* [Bebbington, *et. al.*, "Social movements"]; Leonith Hinojosa & Anthony Bebbington, "Struggles over territory and livelihood in neoliberalized environments: transnational mining companies and civil-society networks in the Andes" (2008) *Working Paper*, online: http://www.sed.manchester.ac.uk/research/andes/publications/reports/Hinojosa_Bebbington_TNCsTNN.pdf.

⁴³ Anthony Bebbington, *et. al.* "Movimientos sociales, lazos transnacionales y desarrollo territorial rural en zonas de influencia minera: Cajamarca-Perú y Cotacachi-Ecuador" in Anthony Bebbington, ed., *Minería, Movimientos Sociales y Respuestas Campesinos* (Lima, CEPES, IEP: 2007) 163 at 168 [Bebbington, *et. al.*, "Movimientos sociales"], citing protests regarding an area of land called "La Quinoa", which is part of Negritos territory.

communities in the area.⁴⁴ The Community continually confronts the divisions generated by Yanacocha's financial influence. For example, in 2007 the Community's elected president was removed from his position and replaced by a unanimous General Assembly of Negritos *comuneros* when it was discovered that Yanacocha subcontracted a business owned by the president's son. The Community is adamant that its leadership maintain political and economic autonomy from Yanacocha. Further, the Community demands that Yanacocha obtain communal permission before making decisions that will affect *comuneros'* land or before procuring subcontracting services. Nonetheless, Yanacocha continues to deny the legitimacy of the elected Community authorities and consistently engages in a multitude of practices that threaten to undermine and divide the Community.

In the face of these threats to communal cohesion, renewed communal identities, political institutions and political action in the Negritos Community are surviving, perhaps even thriving, catalyzed by common concerns. Many of these concerns are beyond the scope of this paper, such as the issue of environmental contamination, lack of access to employment, and the countless impacts of mining operations on *comuneros'* subsistence livelihoods and daily living. Other concerns will be touched on in the final section of this paper, these relate to the Community's concerted struggle for recognition and land rights vis-à-vis the State and Yanacocha. A final catalyst for communal mobilization has been the invasion of the Reserve Area by third parties. This situation is briefly outlined in the following section.

(4) Third-Party Invasion of Communal Land

The 1995 Resolution that had purported to annul the legal personhood of the Negritos Community carved out a "Reserve Area" of 1033.97 hectares of Negritos land. While the State considered the Reserve Area to be State property, this completely contradicted the understanding of the Negritos *comuneros* who believed that the Reserve Area remained Community property. The Negritos *comuneros* communally use and occupy the Reserve Area as grazing land for their sheep and cattle.

In 2004, third parties, not belonging to the Negritos Community, presented certain documents to a local court and successfully received a judgement granting them ownership of land in the Reserve Area. When the Negritos Community became aware of these events in early 2006, it began civil proceedings to nullify the judgement, together with criminal proceedings alleging the falsification of documents and usurpation of communal land. At the same time, the Community began to have reason to believe that a mutually supportive relationship existed between Yanacocha and the third party invaders and that Yanacocha intended to expand its operations in the Reserve Area. As a result, Negritos leaders began to actively organize against this potential expansion.

⁴⁴ Jeffery Bury, "Minería, migración y transformaciones en los medios de subsistencia en Cajamarca, Perú" in Anthony Bebbington, ed., *Minería, Movimientos Sociales y Respuestas Campesinos* (Lima, CEPES, IEP: 2007) 231; Bebbington, *et. al.*, "Movimientos Sociales", *ibid.* at 197.

Nonetheless, the third party invaders began aggressively occupying land in the Reserve Area, preventing the entry of Negritos *comuneros* by threatening to use firearms. These third parties further began to threaten and harass Negritos Community leaders. In response, the Negritos Community made numerous appeals to local police and government officials for police protection. The Community also requested police accompaniment in order to conduct a communal inspection of the Reserve Area in an effort to safely identify the extent of the invasion. This peaceful method for inspecting communal land, referred to as a “*rodeo*”, is a traditional communal practice described and codified in the Negritos Community’s governing documents. When requests for police protection were consistently ignored, 250 Negritos *comuneros* undertook a *rodeo* of the Reserve Area on their own in July of 2006. The armed third party invaders ambushed the *rodeo* and at least one *comunero* was shot and injured.

This violent conflict took a tragic turn in November 2006 when hit men assassinated Esmundo Becerra, a leader in the opposition to Yanacocha’s continued expansion into Negritos territory.⁴⁵ This crime has yet to been prosecuted by the justice system. The fact that Yanacocha’s intelligence apparatus had identified Esmundo Becerra as a “threat” will be discussed in Part II of this paper.

The Negritos Community’s elected leaders continue to send numerous letters to Yanacocha as well as State officials, voicing numerous concerns and requesting that the company and the State recognize the Community and consult before purchasing or developing land belonging to the Community, including land in the Reserve Area. These formal channels have largely failed to render a productive response and as a result the Negritos Community has periodically used tactics of mass civil disobedience, most typically blockading the local highway that Yanacocha relies upon for its operations. However, these informal actions have also had a limited impact and frequently result in criminal charges being laid against the Community’s leadership.

In March of 2007, approximately 200 Negritos *comuneros* united in a General Assembly to authorize the local NGO Grufides to commence a legal investigation into the abuses committed by the Peruvian State and Yanacocha in relation to the expropriation, the easements and the Reserve Area. The Negritos Community has not been alone in its frustration, in its adoption of direct action measures, or in seeking support from Grufides. The next section documents the highly repressive response of Yanacocha and the Peruvian State to the rise in Campesino Community organizing and the prominence of Grufides’ work.

⁴⁵ “A Un Año del Asesinato del Líder Ecologista Esmundo Becerra” (31 October 2007) “*El Maletero*” *Red Verde Cajamarca*, online: <http://caballeroredverde.blogspot.com/2007/10/un-ao-del-asesinato-del-lider.html>, [“Asesinato del Líder”].

III. THE EMERGENCE AND REPRESSION OF GRUFIDES' HUMAN RIGHTS WORK

A. THE RISE OF CAMPESINO COMMUNITY ORGANIZING & GRUFIDES

The Negritos Community's resurgence coincided with similar processes occurring across Peru at the turn of the 21st century.⁴⁶ After more than a decade of proliferating mining concessions and weak domestic legislation, communal organizations and identities across the country have been renewed and mobilized to defend communal territory and the environment. Like the Negritos Community, Campesino Communities in Peru have begun to claim the protection offered by international Indigenous rights regimes, such as *Convention concerning Indigenous and Tribal Peoples in Independent Countries*⁴⁷ ("Convention No. 169"). These newly framed claims are founded on the "rediscovery" of Indigenous identities, formerly obfuscated during the nation-building project of Agrarian Reform.⁴⁸ They also allow Campesino Communities to access an international rights regime that responds to their needs in the face of Peru's weakened land rights regime.

The Negritos Community's complaints against Yanacocha are similar to those raised by the company's other rural neighbors. Generally, these relate to the conditions under which Yanacocha acquired land, fair compensation, civil treatment and greater participation in the benefits of the mine.⁴⁹ As these grievances remained unresolved, the first sign of large-scale protest against Yanacocha occurred in 1999 when 6000 Campesinos, including Negritos *comuneros*, protested Yanacocha's expansion to a part of Negritos territory known as La Quinua, as well as to a neighbouring area called Quilish Mountain.⁵⁰

In response to this surge of activism, the local government passed a municipal by-law in 2000, declaring Quilish a protected area.⁵¹ Support for the municipal by-law was undoubtedly catalyzed by an environmental disaster that had occurred earlier that same year. A mining truck, subcontracted by Yanacocha, accidentally spilled approximately 330 pounds of liquid

⁴⁶ In 1999 the National Coordinator of Mine Affected Communities (CONACAMI) was created with the participation of activists from Cajamarca: José De Echave & Pasco-Font, *Minería y Comunidades* (Lima, CooperAcción: 1999).

⁴⁷ *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, International Labour Organization, Convention No. 169, (1989). Peru ratified *Convention No. 169* on February 2, 1994 and it came into force 12 months later.

⁴⁸ Alejandro Diez, "Las Organizaciones Colectivas, los Recursos y los Pueblos Indígenas en el Perú" in Fernando Eguren (ed.) *Reforma agraria y desarrollo rural en la Región Andina* (Lima, CEPES: 2006) 111 at 124.

⁴⁹ Bebbington, *et. al.*, "Social movements", *supra* note 42. It is widely observed that Peru's foreign direct investment model has failed to improve the standard of living of the country's rural poor, the vast majority of whom remain either poor or extremely poor: see: Laplante & Spears, *supra* note 32 at 101; Bury, "Cambios rurales", *supra* note 18 at 56.

⁵⁰ Bebbington, *et. al.*, "Social movements", *ibid.*

⁵¹ Municipal Ordinance No. 012-2000-CMPC, Cajamarca Provincial Municipality.

mercury on a highway in the rural district of Choropampa.⁵² The Choropampa accident and its mismanagement by both Yanacocha and State officials further offended local Campesino Communities and their growing number of allies, both nationally and internationally.⁵³

These events set the stage for the formation of the NGO Grufides (the *Grupo de Formación e Intervención para el Desarrollo Sostenible*) in 2001 in the city of Cajamarca. These urban activists, mostly university students, were organized and guided by Marco Arana, who at that time served as the Catholic priest of the public University parish. Offering educational, political and legal support to Campesino Communities adversely affected by Yanacocha's mining operations, Grufides quickly gained considerable legitimacy among many of these Communities.

The relationship and trust between Grufides and local Campesino Communities was quickly put on public display when the first large-scale confrontation occurred between Yanacocha and people from both rural and urban Cajamarca. In 2001 Yanacocha brought an action to the Peruvian Constitutional Court arguing that the municipal bylaw protecting Quilish Mountain violated its constitutional right to property and freedom to work on the basis that Yanacocha held the mineral rights, and some of the surface rights corresponding to Quilish Mountain. The Constitutional Court declared in 2003 that the municipal by-law and Yanacocha's rights were *compatible* and that Yanacocha was therefore free to continue its exploration activities in the area.⁵⁴ In response to the Court's judgment, thousands protested in the streets of the city of Cajamarca.⁵⁵ Not surprisingly, when Yanacocha's mining machinery moved into the area in 2004, Campesino Communities mobilized to physically block the expansion and a "general strike" occurred in the city of Cajamarca with ten thousand people publicly protesting for a period of two weeks.⁵⁶

In the midst of this political deadlock, the State called upon Grufides to mediate between community leaders and Yanacocha authorities. Over the course of these mediations, the will of the population of Cajamarca prevailed and Yanacocha withdrew, at least temporarily, its plans to exploit Quilish Mountain. As a consequence of its role in resolving the conflict, Grufides'

⁵² The Choropampa environmental and human health disaster triggered a chaotic series of lawsuits and private indemnification agreements between Yanacocha and individual Campesinos. These agreements have been the subject of significant controversy. Most recently, in 2009, some of the affected municipalities signed a highly controversial settlement agreement with Yanacocha in order to terminate outstanding lawsuits against Newmont in the United States. Serious allegations against Yanacocha officials, State authorities, certain NGOs, and individual lawyers and law firms continue to cast a dark legal shadow over the Choropampa accident. Many individual Campesino claimants remain embroiled in civil claims against Yanacocha in local courts. Grufides has taken responsibility for many of these remaining lawsuits, which suffer from delays, a serious lack of access to adequate legal council and inadequate funds to marshal the evidence needed to substantiate their claims.

⁵³ *Choropampa: The Price of Gold* (Guarango Film & Video, 2001).

⁵⁴ Exps. Acumulados No. 300-2002-AA/TC y Otros, Constitutional Court of Peru (7 April 2003).

⁵⁵ Bebbington, *et. al.*, "Movimientos sociales", *supra* note 43 at 169.

⁵⁶ Laplante & Spears, *supra* note 32 at 105; Bebbington, *et. al.*, "Movimientos sociales", *ibid.* at 169-170.

reputation as an ally of mining-affected communities gained national recognition and the 2004 National Prize in Human Rights was awarded to Marco Arana for his participation in the mediation.

However, not everyone was happy with the achievements of Grufides and its rising prominence as a defender of mining-affected communities. In late 2005, Canadian Lutheran World Relief was told by the Canadian government that it had to end its funding of Grufides or it would lose its co-financing support from the Canadian government. The reason provided was that Grufides' work was a foreign relations problem for Canada.⁵⁷ As a result, Lutheran World Relief terminated Grufides' funding in October 2005 in the middle of the agreed upon project cycle. The terminated funds represented approximately one-third of Grufides' budget at the time.

The behind the scenes manoeuvring of the Canadian government was only the beginning of the problems Grufides was to confront the following year. The *Grufides Case* alleges that in the aftermath of Quilish, Yanacocha escalated its efforts to repress the environmental and social activism growing within Campesino Communities and closely identified with Grufides' NGO work. Given that this repression occurred primarily through a web of contracted and sub-contracted private security services, a brief introduction to the phenomena of private security in Peru follows.

B. THE PRIVATIZATION AND INTERNATIONALIZATION OF PRIVATE SECURITY COMPANIES IN PERU

The sustained level of Campesino protest in Cajamarca indicates that public and private institutions have not responded to the demands of mining-affected communities. This uncomfortable standoff mirrors similar dynamics in the rest of the country. While there are some mining companies in Peru that have assumed a more amicable approach to dialogue with Campesino Communities, the more conservative institutions have resisted the increasing power of these social movements.⁵⁸ The level of violent conflicts in Peru between Communities, mining companies and the State has escalated dramatically since the year 2000.⁵⁹ In 2006 alone, 83 attacks on environmental and human rights defenders were reported.⁶⁰ Further, private security companies are increasingly the principal mediators of these violent confrontations.

⁵⁷ Anthony Bebbington, *et. al.*, *Mining and Development in Peru: With Special Reference to the Rio Blanco Project, Piura* (London, Peru Support Group: 2007) [Bebbington, *et. al.*, *Rio Blanco Project*] at 48-9.

⁵⁸ José De Echave C., "Los Retos Actuales del Movimiento Social Vinculado a la Lucha por los Derechos de las Comunidades Frente a las Industrias Extractivas: El Caso Peruano" Paper presented at Conference *Rethinking Extractive Industry: Regulation Dispossession and Emerging Claims*, York University, Toronto, March 2009) at 9 [unpublished], online: www.yorku.ca/erlac/EI/papers/De%20Echave.pdf [De Echave].

⁵⁹ In 2007 there were 35 recorded separate ongoing conflicts related to mining in Peru and an average of 30 reported incidents of conflict per month: see Laplante & Spears, *supra* note 32 at 99.

⁶⁰ José Luis Gómez del Prado, *Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, UN GA HRC, 7th Sess., A/HRC/7/7/Add.2 (2008) at 15 [UN Working Group].

It has been observed that the proliferation of private security companies is a frequent consequence of the neo-liberal restructuring of economic and social policies.⁶¹ This certainly is the case in Peru where there has been an enormous expansion of private security companies since the neo-liberal shift initiated in the early 1990s.⁶² Since then, successive Peruvian governments have not increased the number of public police officers.⁶³ It is estimated that there are now 100,000 private security guards in Peru, outnumbering the public police force of about 92,000.⁶⁴ It is also believed that half of the private security guards in Peru work for companies in the informal sector, many of which provide security to multinational companies.⁶⁵

There is a close relationship in Peru between State officials and private security companies. In many cases, former members of the Armed Forces or the National Police Force act as owners or senior managers of private security companies. Further, off-duty police officers are permitted to work for private security companies while using State property such as weapons, uniforms and ammunition.⁶⁶ Thus, multinationals are free to hire private security companies which in turn may hire off-duty police officers in order to swell the ranks of private guards available to confront, for example, a situation of social protest. Given the nature of resource extraction activities, confrontations between private security forces and Campesino protesters may take place in extremely isolated areas, risking disastrous consequences.⁶⁷

The private security company known as "Forza" exemplifies these trends in Peru. Forza was created in 1991 with the objective of offering complete "corporate security" services to diverse companies in Peru with a specialization in the industrial, mining and energy sector. Retired personnel from the Armed Forces who specialized in subversion and espionage work for the Fujimori government founded, and continue to manage, Forza. In 1993 Forza became Yanacocha's exclusive private security company. Forza also provides security services to the banking and finance industry, the mining, petroleum and energy sector, as well as the construction sector.⁶⁸ Its clients have included the British Embassy, the National Mining, Oil and

⁶¹ Bonnie Campbell, "Good Governance, Security and Mining in Africa" (2006) 21 *Minerals & Energy – Raw Materials Report* 31 [Campbell]; Alexis P. Kontos, "'Private' security guards: Privatized force and State responsibility under international human rights law" (2004) 4 *Non-State Actors and International Law* 199; Mark Ungar, "The Privatization of citizen security in Latin America: from elite guards to neighborhood vigilantes" (2007) 34 *Social Justice* 20; Robert P. Weiss, "From cowboy detectives to soldiers of fortune: private security contracting and its contradictions on the new frontiers of capitalist expansion" (2007) 34 *Social Justice* 1.

⁶² In 1994 Fujimori introduced Peru's first law pertaining to the regulation of private security services: Supreme Decree No. 005-94-IN, *Approval of the Regulation for Private Security Services* (12 December 1994). This law remained in place until 2006 when Law No. 28879, *Private Security Services Act* was introduced.

⁶³ UN Working Group, *supra* note 60 at 13.

⁶⁴ *Ibid.* at 5, 13.

⁶⁵ *Ibid.* at 6.

⁶⁶ *Ibid.* at 14, 21.

⁶⁷ See *infra* section IV. A. 3 referring to the events that occurred in Majaz.

⁶⁸ Securitas Peru, Segmentos, online: <http://www.securitas.com/pe/es-pe/Customer-Segments/>.

Energy Association, the Inter-American Development Bank, the Standard Bank London Limited, as well as subsidiaries of Coca Cola, Eli Lilly, and Hewlett Packard.⁶⁹

Over its first 17 years of operation, Forza became one of Peru's most important and powerful private security companies. Its status garnered the interest of Securitas, one of the largest transnational private security corporation in the world.⁷⁰ In 2007 Securitas acquired Forza as part of its expansion into the Latin American private security market. According to the Securitas website, its decision to enter the Peruvian security market through the acquisition of Forza was decisively influenced by Forza's "prestige, experience and position in the Peruvian market".⁷¹

While private security companies in Peru have been servicing corporations for the last two decades, they have recently been tied to a "new development". Specifically, private security companies have become implicated in the coercion, harassment and intimidation of human rights organizations working to defend the economic, social and environmental rights of mining-affected communities.⁷² Further, the State and private companies have begun to regularly employ anti-activist, anti-environmentalist discourse. This discourse aims to discredit activists and construct them as a violent, leftwing, anti-mining, anti-development, terrorist conspiracies.⁷³

The aggression of private security companies against human rights defenders has its counterpart in the public sphere. In 2006 and again in 2007 the State escalated its efforts to criminalize public protest by introducing numerous modifications to the Criminal Code. These changes distorted and broadened existing criminal offences to capture activities related to social protest. Draconian prison sentences were created for "the obstruction of public services", which includes protest-related activities such as road blockades.⁷⁴ Most dramatically, police officers and military personnel who murder citizens while carrying out their duties, such as controlling public protest, have guaranteed immunity from prosecution.⁷⁵ This is the first time in Peruvian history that this type of immunity has been legally codified.

⁶⁹ CreditosPeru, Forza, online: <http://www.creditosperu.com.pe/pp-forza-s-a.php>.

⁷⁰ Securitas has 12% of the global market share and employs over 240,000 individuals to offer services in over 40 countries on every continent: see Securitas, About Us, online: <http://www.securitas.com/en/About-Securitas/>

⁷¹ Securitas, About Us, Securitas Peru, online: <http://www.securitas.com/pe/es-pe/About-Us/Securitas-Peru/>.

⁷² UN Working Group, *supra* note 60 at 5, 15, 21.

⁷³ De Echave, *supra* note 58. UN Working Group, *ibid.* at 19, 21. The most notorious example of this discourse was provided by an article published by the President Alan García in Peru's largest national newspaper: Alan García, "El Perro del Hortelano" *El Comercio* (28 October 2008).

⁷⁴ Wilfredo Ardito Vega, *et. al.*, *Serios Peligros para los Derechos Humanos: La Criminalización de la Protesta en el Gobierno de Alan García* (Lima, Asociación Pro Derechos Humano, 2008); Mirtha Vasquez, *The Criminalization of Protest*, Paper presented at the Conference *Rethinking Extractive Industry: Regulation Dispossession and Emerging Claims*, York University, Toronto, March 2009 [unpublished].

⁷⁵ Legislative Decree No. 982 (22 July 2007), art. 1, modifying art. 20, clause 11 of the *Criminal Code*.

C. YANACOA, FORZA, AND THE PERSECUTION OF GRUFIDES ACTIVISTS

A violent clash in 2006 between the mining-affected community of Combayo and Yanacocha triggered the events giving rise to the *Grufides Case*. In August of that year, approximately 100 Campesinos initiated a highway blockade while 500 more protested peacefully in the streets of Combayo. The protestors nominated Grufides to assist in efforts to dialogue with Yanacocha. They were frustrated by Yanacocha's failure to fulfil various commitments and its unresponsiveness to complaints of environmental contamination. Yanacocha responded by deploying approximately 190 armed officers to put an end to the blockade. This security force consisted of Forza officers, together with off-duty police officers contracted by Yanacocha.

In violent confrontations between these security forces and Campesino protestors, a Campesino by the name of Isidro Llanos was shot and killed. Yet in the face of the manifest threat of violence and risk to life, the Combayo Campesinos persisted. A few weeks after Isidro Llano's death the on-going blockade forced Yanacocha to halt its operations for three days. At this point, with Yanacocha now incurring economic losses, high-level State officials intervened and requested that Grufides act as the official mediator of the conflict. Although the conflict was eventually resolved, the murder of Isidro Llanos was never prosecuted. It is reported that his surviving family members received private compensation from Yanacocha pursuant to a confidential agreement.

The violent response to the Campesino blockade in Combayo had a counterpart in the city of Cajamarca. In a series of press conferences, Yanacocha's manager of external affairs repeatedly and publicly accused Grufides of manipulating Campesino Communities and exacerbating the Combayo conflict. These comments were followed by anti-Grufides marches, allegedly funded by Yanacocha and organized and directed by a number of Yanacocha's senior managers. The participants in these marches were primarily Yanacocha employees and their family members. Some marchers reported having been told to participate in the marches or risk losing their employment.

The anti-Grufides marches took place continuously over a period of several days, timed exactly with the temporary closure of Yanacocha due to the Combayo protest. The marchers primarily remained stationed in front of the Grufides office, harassing, intimidating, threatening and insulting Grufides personnel. Alarmingly, in the face of these acts, the public police force failed to intervene and provide Grufides personnel with protection. Grufides personnel were essentially trapped in their office, until Campesinos from several rural communities came to their rescue in the late hours of the night, chasing away Yanacocha's employees.

These marches heralded the escalation of "*Operación Diablo*", a systematic program of intimidation, death threats and defamation, primarily targeting Grufides personnel, but also

spanning to include approximately 30 other related local environmentalists and Campesino leaders. *Operación Diablo* also included the constant surveillance and digital documentation of the daily activities of Grufides personnel. At the same time, the telephones in the Grufides office were tapped.⁷⁶ This intense harassment and surveillance of Grufides continued for a period of months without police investigation.

On one occasion, Grufides personnel apprehended an individual who had been following them and brought the suspect to police. Yet before being questioned, this individual escaped police custody in full view of the responsible police officers. A bystander with a camcorder filmed the complicity of the police in this escape. On a second occasion, Grufides personnel again apprehended another individual who had been filming and following them. Upon being detained, this individual confessed that he was in the employ of C&G Investigations, a private investigation company owned and operated by a retired former Capitan of the Peruvian Police force.

The circumstances of this second apprehension forced police and a prosecutor to investigate the C&G offices where they discovered and confiscated seriously incriminating evidence. This included computers and other digital devices containing hundreds of photographs of Grufides personnel and other activists. Also found were electronic and hard copies of hundreds of police-styled surveillance reports that documented the activities of these activists. The information in these reports indicated that they were regularly submitted by C&G employees to a pseudonymed individual in accordance with the terms of *Operación Diablo*. Documentation of payments made for services between Forza and C&G was also found on the C&G premises.

Shockingly, the police returned this incriminating evidence directly to C&G approximately one month after its discovery. The surveillance information documenting the private and public lives of Grufides personnel was returned completely intact. Further, the computer hard drives were returned before the vast majority of the incriminating information was fully reviewed, recorded or copied by police.

In view of the complete refusal of the police to properly investigate *Operación Diablo*, anonymous sources submitted further evidence directly to Grufides as well as to highly reputable journalists in Lima who were conducting their own investigation. This evidence included Forza's operational manual, which revealed that the pseudonym of the individual to whom C&G had directed its reports corresponded to Forza's head manager of operations. This evidence also consisted of a PowerPoint presentation entitled "Existing Threats to Yanacocha 2006" and "Principal Leaders in Cajamarca that Oppose Yanacocha's Mining Activity". These electronic documents contained photographs and descriptions of Grufides personnel along with leaders from other local environmental and Campesino organizations.⁷⁷ Among them was a photograph of the Campesino leader Esmundo Becerra who was active in the defence of the

⁷⁶ See *infra* section IV. A. 3 for a discussion regarding the evidence that links this telephone tapping to *Operación Diablo*.

⁷⁷ UN Working Group, *supra* note 60 at 49.

Negritos' Reserve Area from Yanacocha's expansion. Esmundo was assassinated with seventeen gunshot wounds inflicted by hit men in December of that same year.⁷⁸

The *Grufides Case* alleges that there is clear and compelling evidence that *Operación Diablo* was executed by Yanacocha's private security company Forza who in turn sub-contracted C&G Investigations. In spite of the overwhelming evidence linking C&G, Forza, and Yanacocha to Operation the Devil, the Peruvian justice system has consistently refused to properly investigate and criminally prosecute those responsible. On the contrary, it is well documented that on at least two occasions the police force was complicit in the crimes committed. Complaints filed by Grufides in relation to police conduct in the course of the investigation have been unsuccessful.

IV. LEGAL PROCESSES DRIVEN BY THE PRIVATE PUBLIC CONVERGENCE

The *Negritos Case* and the *Grufides Case* depict a clear convergence of private and public power in reference to Campesino communal land. This convergence is driving four different legal processes: (1) the privatization and dispossession of Campesino communal land; (2) the production of formalistic consent to the elimination of rights; (3) the privatization of coercive force; and (4) the absence of an effective legal remedy. The conflation of the roles and responsibilities of the State and Yanacocha in the context of each of these legal processes will be analyzed in this section.

A. THE PRIVATIZATION AND DISPOSSESSION OF COMMUNAL LAND

The legal story of the privatization of the Negritos Community's land interests, told in the first part of this paper, illuminates the efforts of the State to facilitate this privatization to the benefit of Yanacocha. It documents, in concrete terms, the systemic bias in favour of individual title inherent in Peru's Campesino land regime. It further demonstrates the conditions within which individual title easily results in the disposition of Campesino land to foreign private investors. Finally, the *Negritos Case* reveals how both the State and Yanacocha participated, to varying degrees, in the monetary valuation of the "compensation" to be paid in exchange for the transfer of Negritos land interests to Yanacocha.

Because the legal account of these events is told through the lens of administrative law, it emphasizes the State's facilitative role in the privatization process. It is difficult to capture, through formal legal evidence, the deeper informal relationships between Yanacocha and the State that may be implicated in the privatization of land. To this end, the work of Jeffery Bury,

⁷⁸ See: "Asesinato del Líder" *supra* note 45 and accompanying text.

an American geographer who has extensively studied shifting land tenure patterns in Cajamarca, is helpful. According to Bury, Yanacocha secured the purchase of collectively managed land by initiating a series of rapid individual land-titling initiatives. In particular, Yanacocha's employees "organized community meetings, transported people to the city in mine vehicles and ushered them through the land-titling process so that the mine could purchase their land."⁷⁹ On the basis of his research, Bury concludes that Yanacocha became the principal agent affecting the consolidation of individual land tenure in the area of its planned operations. Thus, Bury's description of Yanacocha's informal role in promoting the privatization of collectively managed land in rural Cajamarca affirms the legally documented conflation of State and private power in reference to Negritos land.

The transfer of Negritos land to Yanacocha consolidated a legal regime that allowed Yanacocha's shareholders to accumulate enormous amounts of wealth, converting it into one of the most profitable mining investments in the world. Yet the *Negritos Case* reveals that the payments made in exchange for Negritos land were grossly unjust and rife with the potential for corruption. As a result, while one of the most profitable gold mines in the world operates on their land, Negritos *comuneros* continue to experience among the highest levels of extreme poverty and unemployment in all of Peru.⁸⁰ All this suggests that, under present conditions, the privatization of communal land is appropriately described as a process of *dispossession*.

The *Negritos Case* alleges that in the course of privatizing the Negritos Community's land, the Peruvian State and Yanacocha violated, *inter alia*, the Negritos *comuneros'* right to collective property, to fair and equitable compensation and to participate in the benefits of resource extraction on their land. These rights were protected in domestic legislation, the Peruvian Constitution, the *American Convention on Human Rights*⁸¹ and *Convention No. 169*. The impugned conduct of Peruvian State officials in the *Negritos Case* resonates disturbingly with the observations, made decades prior, by the Inter-American Commission on Human Rights in its report *Special Protection for Indigenous Populations, Action to Combat Racism and Racial Discrimination*:

That for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states;

That on various occasions this Commission has had to take cognizance of cases in which it has been verified that abuses of power committed by government officials responsible for administrative work in connection with indigenous communities have caused very serious injury to the human rights of their members;

⁷⁹ Bury, "Mining mountains", *supra* note 28 at 232.

⁸⁰ The Negritos Community is emblematic of the widespread observation, made even by the World Bank itself, that the privatization of Campesino land in Peru has not benefited Campesino Communities who remain among the poorest, most marginalized members of society: see Hall & Patrinos, *supra* note 2.

⁸¹ *American Convention on Human Rights*, 1144 U.N.T.S. 123; OEA/Ser.L.V/II.82 doc.6 rev.1 at 25.

That these offenses against human rights are all the more reprehensible considering that they are committed by agents of the public power and have as their victims persons or groups for whom the effective exercise of their means of defense established by the laws of the respective states is particularly difficult...⁸²

The *Negritos Case* places the contemporary social inequity of the Negritos Community in a historical legal context by documenting the legal processes that link this inequity to Campesino dispossession, the private public convergence, and Peru's colonial history. This reveals that the contemporary convergence of private and public power functions to extend the colonial injustices that Agrarian Reform failed to remedy. Not only is private and public power converging to dispossess Campesino Communities of their land, this dispossession is made possible because of the unresolved legacy of colonialism. The objects of the dispossession in question are the Indigenous labourers of the former *haciendas* and their decedents. In this analysis, the law has functioned to install Yanacocha in Cajamarca as the modern inheritor of the colonial relationship enshrined in the former *hacienda* model.⁸³ As a matter of legal history and as a result of legal processes, Yanacocha is the modern *hacienda* owner, or *hacendado*, made legitimate by modern law.

B. THE PRODUCTION OF FORMALISTIC CONSENT

The modern *hacienda* model described above is insidious because it purports to derive its legality and legitimacy from the consent of the Negritos Community. The *Negritos Case* demonstrates how the State and Yanacocha converged to produce, in the most formalistic of terms, the ostensible "participation" and "consent" of the Community to its own dispossession and legal annihilation. Meetings were held, in some cases a relatively nominal amount of money changed hands, documents were signed, and the Negritos Community presumably "agreed" to eliminate its land interests and renounce its rights as a Campesino Community. In

⁸² OAS, Inter-American Human Rights Commission, *Special Protection for Indigenous Populations, Action to Combat Racism and Racial Discrimination*, OR OEA/Ser.P.AG/doc. 305/ 72, rev. 1, (1973) at 90-1 cited in Fergus MacKay, *A Guide to Indigenous Peoples' Rights in the Inter-American Human Rights System* (UK: Forest Peoples Programme, 2001) at 22 online: <www.forestpeoples.org/documents/law_hr/iachr_briefing_oct_01_eng.pdf> [MacKay, *Guide to Rights*]. The of responsibilities of public officials to indigenous people was reiterated in: OEA, Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Ecuador*, OR OEA/Ser.L/V/II.96, Doc. 10 rev. 1 (1997).

⁸³ Writing in the development literature, Anthony Bebbington suggests that corporate social responsibility programs in Peru create an "assemblage" that "looks very much like a modern form of the hacienda model". He describes this as "a packet of interventions that combines market transactions and patronage relationships, and that in the process builds a wide-ranging web of relationships centered on the company." He further cites claims that these programs provide services and employment in a manner that is imbued with deeply retrograde attitudes toward Campesinos: see Anthony Bebbington, "Extractive industries and stunted states: conflict, responsibility and institutional change in the Andes" in R. Ramen, ed., *Corporate Social Responsibility: Discourses Practices and Perspectives* (London, Palgrave MacMillan: forthcoming).

legal terms, the State facilitated the production of consent through the mechanisms of administrative law while Yanacocha obtained consent by directly negotiating with *comuneros* on the “free market” to exchange money for land.

The *Negritos Case* alleges that the procurement of the Community’s “consent” violated domestic laws, not least of which being the norm that communal land cannot be alienated without a vote of two-thirds of the Campesino Community united in a General Assembly.⁸⁴ It further alleges that the Peruvian State failed to fulfil its duty under the *American Convention* and *Convention No. 169* to ensure that the decisions of the Negritos Community were fully informed and freely made. The Inter-American Court has recognized that Indigenous property rights originate in Indigenous forms of land tenure, rather than state recognition.⁸⁵ States have a duty to recognize and respect the collective aspects of these rights and put adequate measures into place to guarantee that communities enjoy their property rights in practice.⁸⁶ The Inter-American Commission has declared that states must take special measures to ensure that Indigenous peoples are not deprived of their property except with fully informed consent, under conditions of equality, and with fair compensation.⁸⁷ The provisions of the *United Nations Declaration on the Rights of Indigenous Peoples*,⁸⁸ approved by the UN General Assembly in 2007, further reflect these principles.⁸⁹

Thus, the thin veneer of legality created by the production of consent quickly evaporates upon a substantive analysis of the *Negritos Case* on the basis of the applicable international and domestic human rights norms. The testimonial evidence collected by Bury and others affirms that the practices of State functionaries and Yanacocha officials in producing legal formalistic consent were unscrupulous at best and abusive at worst. The impossibility of free and informed consent is underscored by the continued existence of the Negritos Community as a cultural, sociological and political fact. The Negritos Community has been actively organizing to defend its land from mining expansion for over ten years, while it has sought to regain State recognition for the last four years. The response of the State and Yanacocha has ranged from indifference to repression. This reveals the hypocritical approach to consent inherent in the private public convergence: uninformed “consent” to the elimination of rights is ushered through the legal system while the Negritos Community’s vigorous and repeated demand to control the use of its land and participate in the benefits of Yanacocha’s mining activities is ignored.

⁸⁴ See: *Campesino Communities General Law*, *supra* note 8.

⁸⁵ *Awas Tingni*, *supra* note 14.

⁸⁶ *Case of the Indigenous Community of Yakye Axa (Paraguay)* (2005) Inter-Am. Ct. H.R. (Ser. C) No. 125; The Court has also concluded that physical possession of a traditional territory is not a precondition for the existence of indigenous property rights where the indigenous community has involuntarily lost possession of its land: *Case of the Indigenous Community of Sawhoyamaya (Paraguay)* (2006) Inter-Am. Ct. H.R. (Ser. C) No. 146.

⁸⁷ *Maya Indigenous Communities of the Toledo District (Belize)* (2004), Inter-Am. Comm. H.R. Report No. 40, Case 12.053; *Mary and Carrie Dann (United States)* (2002), Inter-Am. Comm. H.R. Report No. 75, Case 11.140.

⁸⁸ UNGAOR, 62 Sess., Annex, Agenda Item 68 UN Doc. A/61/L.67 (2007) at 1.

⁸⁹ The Declaration establishes that consultation to obtain indigenous peoples’ free and informed consent prior to carrying out any project affecting indigenous land, particularly in connection with mineral resources, is the minimum standard for the survival, dignity and well-being of indigenous peoples: *ibid.*, arts. 32(2), 43.

There is no doubt that, at least in the *Negritos Case*, the privatization of Campesino land generated by the convergence of private and public power cannot derive its legitimacy from any legally recognized notion of consent. This suggests that the convergence of State and private power is predicated on a notion of consent that closely resembles coercion, manipulation, and the abuse of power. This conclusion is relevant to current efforts to operationalize the concept of “free, prior and informed consent” in international law. The observations made in the *Negritos Case* question the possibility of “free consent” in a context where the processes of the private public convergence that produce consent remain intact. Fundamentally, this refers to the use of administrative law to facilitate direct free-market based negotiations between companies and communities.

C. THE PRIVATIZATION OF COERCIVE FORCE

The *Grufides Case* highlights the coercive aspect of the private public convergence. It is clear that Grufides began to advocate on behalf of Campesino communities in the absence of a State authority willing to identify the needs of Campesino communities and to act to protect their interests. To the extent that Grufides was successful in supporting Campesino communities, and to the extent that Campesino communities intensified their demands, both were met with organized repression on the part of Yanacocha’s private security companies. In other words, as the State retreated, private power expanded to repress the rise in civil society organizing.

The *Grufides Case* also signals a deep interpenetration of the State’s coercive power with Yanacocha’s economic power. On one hand, the police force in Cajamarca has essentially been privatized in order to serve the needs of Yanacocha. As described above, Peruvian law permits private companies to hire off-duty police officers to perform security services while using state-owned property. Exploiting this opportunity, Yanacocha has negotiated a “cooperation agreement” with the local police force to protect its property, members, and the homes of its top executives as well as to escort its vehicles.⁹⁰ In return, Yanacocha provides a bonus to individual police officers and makes a contribution to the police force. Since the cooperation agreement is not public, the extent of Yanacocha’s economic support for the police force is unknown. Further, it is unclear which institution, Yanacocha or the chief of police, gives the Yanacocha-paid police officers orders and is legally responsible for their actions.

On the other hand, Yanacocha’s private security companies are interwoven with public attributes and roles. As discussed above, Forza is owned and managed by former police and military personnel. Forza officers protect Yanacocha’s most valuable property, including its

⁹⁰ Gino Costa, *Comprehensive Review of Minera Yanacocha’s Policies Based on the Voluntary Principles of Security and Human Rights* (12 Mayo 2009) at 11 [Costa, *Comprehensive Review*].

mining facilities, its gold refinery and explosive storehouses.⁹¹ Yanacocha has not delineated the domain and scope of action of Forza officers in relation to that of police officers.⁹² For example, Forza agents worked alongside off-duty police officers to control the Combayo road blockade. It has never been clarified whether it was Forza or police officers that shot and killed the Campesino Isidro Llanos while he participated in the Combayo road blockade. Further, Yanacocha does not have procedures to ensure that Forza officers have actually been discharged from military or police service and have a clean criminal record.⁹³ In this regard, disturbing photographs were made public in January of 2009 that depict police and Forza officers torturing at least 29 *comuneros* who were protesting the activities of Majaz Mine in a region that neighbours Cajamarca.⁹⁴ These events occurred in July and August of 2005, just prior to the violations alleged in the *Grufides Case*.

Yanacocha also employs at least two private intelligence companies, charged with collecting information in both rural and urban Cajamarca.⁹⁵ This is likely the same web of intelligence that produced the PowerPoint presentation entitled “Threats to Yanacocha”, mentioned above, which profiled Negritos *comunero* Esmundo Becarra, who was later assassinated by hit men. There are also reports that these intelligence companies share information with the military. In this respect, Yanacocha has no procedures in place to ensure that that this does not occur.⁹⁶ Further, it was recently discovered in 2009 that a third intelligence agency, Business Track Resources, wire tapped Grufides’ telephone lines in 2006, precisely while *Operación Diablo* was in full effect.⁹⁷ It is not known who paid Business Track Resources to undertake these criminal acts, but it is known that Forza was one of its corporate clients.⁹⁸ Like Forza, Business Track Resources was founded and managed by former military personnel.

On the basis of the foregoing, it appears that while private interests increasingly control public coercive power, private coercive power is also assuming a somewhat public character. In addition, there is an underlying irony that accompanies this convergence. As discussed above, the relative proportion of the State’s coercive function has been reduced as private security companies take a more prominent role in the exercise of force and intelligence gathering. However, the level of repression permitted within the remaining sphere of State power has nonetheless increased. Criminal code offences have been broadened to include public protest while on-duty police and military officers enjoy a codified right to impunity when committing

⁹¹ *Ibid.*

⁹² *Ibid.* at 15.

⁹³ *Ibid.*

⁹⁴ Elizabeth Prado, “Minería y Violaciones de Derechos Humanos: El Caso de Minera Majaz, Piura – Perú, *La Republica* (9 January 2009). For an extensive background report on the conflict, see: Bebbington *et. al.*, *Rio Blanco*, *supra* note 57. At the time that these crimes were committed, Majaz Mine was a wholly owned subsidiary of the British mining company Monterrico Metals: *Mario Alberto Tabra Guerrero & Others v. Monterrico Metals PLC & Rio Blanco Copper SA*, [2009] EWHC 2475 High Court of Justice, Queen’s Bench Division.

⁹⁵ Costa, *Comprehensive Review*, *supra* note 90 at 11.

⁹⁶ *Ibid.* at 15.

⁹⁷ Expediente No. 527-09, Thirty-Fourth Criminal Court of Lima (30 November 2009).

⁹⁸ Ángel Paez, “Spying on Social Movements” *Inter Press Services* (12 March 2009), online: <http://ipsnews.net/print.asp?idnews=46090>.

murder in the course of “controlling” protest. Thus, while the coercive arm of the State has been privatized, it has also been simultaneously strengthened.

D. THE ABSENCE OF EFFECTIVE LEGAL REMEDIES

Both the *Grufides Case* and the *Negritos Case* constitute last resort legal actions that have arisen because of the absence of effective legal remedies for addressing the human rights violations alleged. Beginning in 2006 and continuing on to present, the Negritos Community has participated in numerous administrative processes in an effort to obtain State recognition of its legal personhood and land rights, in particular with respect to the Reserve Area. In response, the State has consistently denied the existence of the Community’s legal personhood and refused to recognize any associated rights. In the legal system the Community has encountered significant and numerous delays and procedural obstacles in its criminal and civil lawsuits to defend the Reserve Area. To date, all of these lawsuits remain unresolved. Finally, the Negritos Community has sent countless letters to Yanacocha, raising a range of related complaints and asking the company to refrain from purchasing Negritos land. These efforts have been similarly fruitless.

As a result, the Negritos Community, like other communities, has regularly resorted to public protest. The State’s reliance on Grufides to mediate the Quilish and Combayo conflicts reveals its inability to effectively resolve overt conflict between mining companies and social movements. One obvious explanation for this is that Yanacocha’s enormous economic power has created the perception, if not the reality, that the State is not impartial. For example, Yanacocha has financed the operational costs of public offices and community dialogue processes.⁹⁹ However, given the dimensions of the private public convergence described throughout this paper, a further conclusion must be drawn. Namely, the State is unable to effectively address the demands of mining-affected communities precisely because of its legal and administrative complicity in the dispossession that these communities are reacting against. Stated differently, the Peruvian State’s unresponsiveness results from the merger of public and private power specifically in relation to Campesino land. This assertion is starkly depicted by the facts of the *Negritos Case*.

Building on this, the *Grufides Case* suggests that the complicity of the Peruvian State extends to the criminal conduct of Yanacocha’s private security companies. The police force refused to provide Grufides with adequate protection in the face of the openly hostile anti-Grufides marches. Police officers then permitted the escape of a known suspect. Finally, the prosecutor returned incriminating evidence to Yanacocha’s allegedly subcontracted private security companies and resolved not to prosecute the perpetrators of Operation the Devil. Likewise,

⁹⁹ Bebbington, *et. al.*, “Movimientos sociales”, *supra* note 43 at 220.

the deaths of Esmundo Becerra and Isidro Llanos were never prosecuted. Ironically, the death of Combayo Campesino Isidro Llanos appears to have been addressed by the private mechanism of voluntarily corporate responsibility rather than criminal prosecution. Yanacocha privately settled with the Campesino family of Isidro Llanos while Forza now funds a local day care in Combayo.¹⁰⁰

It has been observed that pro-investment neo-liberal law reform, particularly in the area of mining, has undermined the State's capacity to govern.¹⁰¹ Taken together, the *Grufides Case* and the *Negritos Case* build on and sharpen the law-related dimensions of this point. They demonstrate that in the wake of neo-liberal mining oriented reforms, the criminal justice system and the administrative law system have become wholly unable to address the human rights issues at the centre of the private public convergence: the privatization of land and the use of coercive force. A long line of inter-American jurisprudence, beginning with the *Velasquez Rodriguez Case (Honduras)* in 1988, has affirmed that the State has a fundamental duty to appropriately prevent, investigate and sanction all criminal acts.¹⁰² This jurisprudence further establishes that the human rights violations of private actors become the State's responsibility in international law when it fails to fulfil this duty. Indeed the fulfilment of this duty is precisely what legitimates the State's use of coercive power in the first place. Thus, to the extent that the Peruvian State uses its coercive power to protect large-scale private investment interests at the expense of civil society actors, it necessarily looses its democratic legitimacy.

In the face of this situation, the claimants behind the *Grufides Case* and the *Negritos Case* confront the very real possibility that the alleged perpetrators of these human rights violations will continue to enjoy impunity. Having exhausted all domestic remedies, the only legal recourse now available to the Grufides claimants is their petition to the Inter-American Commission on Human Rights, filed in May 2009. As described above, this petition alleges that the State has failed to properly investigate, prosecute and sanction the individuals responsible for *Operación Diablo*, and further, that the State was complicit in these acts.

On the other hand, the Negritos Community has a final domestic legal avenue available in the form of the constitutional *amparo* action. The *amparo* is somewhat analogous to a common law application for judicial review. According to the *Political Constitution of Peru, 1993*, the *amparo* offers a declaratory remedy against any authority, public functionary or legal person who violates or threatens to violate another party's constitutional rights.¹⁰³ According to the Constitutional Court of Peru, the international human rights treaties that the State has ratified are incorporated into the Constitution thereby creating enforceable rights.¹⁰⁴ As such, through

¹⁰⁰ Securitas, Seucritas Perú, Responsabilidad Social: online: <http://www.securitas.com/pe/es-pe/About-Us/Responsabilidad-Social/>.

¹⁰¹ Campbell, *supra* note 61; Bebbington, *et. al.*, "Contention and Ambiguity", *supra* note 32 at 987.

¹⁰² *Velasquez Rodríguez (Honduras)* (1988) Inter-Am. Ct. H. R. (Ser. C.).

¹⁰³ *Political Constitution of Peru, 1993*, subsection 200(2); *Constitutional Procedural Code*, Law No. 28237.

¹⁰⁴ STC No. 0025-2005-PI/TC (25 April 2006) Constitutional Court of Peru, at para. 33; STC No. 003343-2007-PA/TC (19 February 2009) Constitutional Court of Peru, at para. 31.

the *amparo*, the Negritos Community is able to allege that both the State and Yanacocha are responsible for ongoing violations of the Community's rights as protected by the Peruvian Constitution, the *American Convention on Human Rights*, and *Convention No. 169*. This would create a national precedent in that it represents the first time a Campesino Community in Peru has brought such a cause of action against a transnational mining company.

However, the *amparo* remedy is declaratory and the enforcement of a favourable decision would rely on the political will of the Peruvian administrative system. Likewise, decisions of the Inter-American Court and Commission lack an enforcement mechanism and their implementation is largely a question of political will. Given the nature of the private public convergence, it seems reasonable to question how responsive Peru's administrative and judicial system will be in both cases. This concern is taken up in my concluding remarks.

V. CONCLUSION

This case study of Yanacocha Mine in Peru has developed the argument that the public power of the Peruvian State and the private power of Yanacocha have converged in relation to Campesino land and the use of coercive force. This argument flows from the analysis conducted of the *Negritos Case* and the *Grufides Case* in their socio-legal historical contexts. This analysis posits that the private public convergence is implicated in four inter-related legal processes, which in turn have consequences for the protection of human rights. It is argued that in the Yanacocha case study, the production of *comuneros'* consent to the privatization of Campesino land was predicated on the abuse of private and public power resulting in the substantive dispossession of Campesino Communities. Likewise, the privatization of coercive force together with an evidently unresponsive and ineffective justice system creates a situation of impunity for both public and private human rights violators.

These observations present serious theoretical challenges for international human rights law as well as difficult practical questions for human rights litigators. As a strategic matter, the weakening of domestic legal norms and institutions means that mining-affected communities are compelled to draw on the relatively robust norms in international human rights conventions and associated jurisprudence. However, this does not resolve the question of enforcement. The Yanacocha case study depicts a situation where the administrative law system and the criminal justice system have been complicit in the human rights violations generated by the convergence of private and public power. This reality suggests that the domestic enforcement of a favourable judicial decision may be very difficult to achieve in practice.

To the extent that domestic enforcement is cast into doubt, an important question arises: how can law and litigation, particularly international human rights law, effectively address the

human rights violations implicated in the private public convergence? It would seem that what is needed is a cause of action (and a forum) that places international human rights norms in a juridical context that makes them enforceable in relation to both the Peruvian State and Yanacocha. The absence of such a system has been referred to as a "regime deficit" or a "legal vacuum".¹⁰⁵

Ironically, contemporary developments in international human rights norms and mechanisms are following a very different trajectory. At present, "corporate social responsibility" constitutes the dominant, if not the only, international legal innovation to address the human rights issues raised by the resource extraction industry, and particularly in circumstances like the *Grufides Case* and the *Negritos Case*.¹⁰⁶ As implemented thus far, this approach constitutes a system of voluntary "principles" and "norms" located in the private sphere. It is "voluntary" in that it purposefully lacks mechanisms of external enforcement and, in many cases, even mechanisms of independent adjudication or evaluation of compliance. Yanacocha is currently "governed" by a significant number of some of the most celebrated voluntary regimes.¹⁰⁷

The conclusions offered in this case study fundamentally question the ability of voluntary corporate social responsibility to address the serious human rights issues raised by the private public convergence. Communities in the Americas are now regularly demanding that, as a normative matter, mining development cannot occur without their free, prior and informed consent.¹⁰⁸ Like the communities of Negritos, Quilish, and Combayo, these communities have assumed significant risks and sacrifices in order to physically block mining activity. In many cases community leaders and protestors have lost their lives and suffered physical injury. But neither these serious risks, nor the spectre of corporate impunity, appear to be deterring these social movements. The members of these movements have sent a clear and sustained message

¹⁰⁵ Shedrack Agbakwa, "A Line in the Sand: International (Dis)Order and Impunity of Non-State Corporate Actors in the Developing World" in Antony Anghie, *et. al.*, eds., *The Third World and International Order: Law Politics and Globalization* (Leiden: Brill Academic Publishers, Martinus Nijhoff, 2003) at 4-5.

¹⁰⁶ Cynthia A. Williams, "Civil Society Initiatives and 'Soft Law' in the Oil and Gas Industry" (2003-2004) 36 *New York University Journal of International Law & Policy* 457; David Graham & Ngaire Woods, "Making Corporate Self-Regulation Effective in Developing Countries" (2006) 34 *World Development* 868; August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors" in Philip Alston, ed., *Non-State Actors and Human Rights* (New York: Oxford University Press, 2005) 37.

¹⁰⁷ For example, Yanacocha's majority shareholder, Newmont, has directly signed onto: (1) the United Nations Global Compact; (2) the Global Reporting Initiative; (3) the Voluntary Principles for Security and Human Rights in the Extractive Industry; and (4) the Position Statement on Mining and Indigenous Peoples of the International Council on Mining and Metals. Yanacocha would also be governed by the corporate responsibility regimes created by the Organization for Economic Cooperation and Development and the World Bank.

¹⁰⁸ Some examples are: **Tambogrande, Peru in 2002:** Oxfam America, "Tambogrande Speaks Out" (20 June 2002), online: <www.oxfamamerica.org/newsandpublications/news_updates/archive2002/art2763.html>. **Ontario, Canada in 2008:** Kitchenuhmaykoosib Inninuwug (KI), News Release, "Aboriginal Leaders Face Jail Time in Spreading Disputes over First Nations Rights and Mining Claims: Consultation and Conservation Demands Conflict with Outdated Mining Law across Canada's Boreal Forest" (25 January 2008); Ardoch Algonquin First Nations, Press Release, "Jailing Aboriginal Leaders to Promote Uranium Mining in Ontario" (19 February 2008); **San Marcos, Guatemala in 2005:** Shin Imai, *et. al.*, "Breaching Indigenous Law: Canadian Mining in Guatemala" (2007) 6 *Indigenous Law Journal* 101; **Majaz, Peru in 2005,** Bebbington, *et. al.*, Rio Blanco, *supra* note 57; **Cotacachi, Ecuador in 2005:** Bebbington, *et. al.*, "Movimientos sociales", *supra* note 43.

that they are willing to risk their physical safety in order to prevent resource extraction on their land and in their communities.

Nonetheless, it is concerning that, at least in Peru, ten years of public protest and activism has produced very little real change in public policies on mining and human rights.¹⁰⁹ While these social movements are vibrant, the private public convergence is entrenched in a domestic and international legal regime that protest alone cannot change. In this context, international human rights lawyers and scholars are challenged to think creatively and act courageously to imagine new legal mechanisms that practically support these social movements and translate their demands into a coherent international law reform agenda.

This necessarily involves taking the private public convergence seriously and evaluating legal mechanisms from the perspective of those who are directly affected by human rights violations of the sort raised in this case study. With this in mind, civil society actors and human rights lawyers must engage in a serious debate regarding the efficacy of devoting more time, effort and resources to voluntary corporate social responsibility norms. The power struggles at the heart of the Yanacocha case study must be kept in view, namely: the redistribution of wealth implicit in Campesino land rights claims, and the spectre of corporate impunity raised by unsanctioned criminal conduct. Taking the rights of mining-affected communities seriously begins with evaluating any proposed or actual system of human rights law for its ability to offer substantive remedies to the victims of violations committed in relation to these key sites of power.

¹⁰⁹ Bebbington, *et. al.*, "Contention and Ambiguity", *supra* note 32 at 983.

